Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

JAVIER PEREZ,

Petitioner,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), this Court held that an employee establishes a violation of Title VII of the Civil Rights Act of 1964 by demonstrating that he was disciplined for a job infraction when other employees of another race were not disciplined for infractions of "comparable seriousness." *Id.* at 282-83 n.11. The question presented is:

Whether an employee asserting racial discrimination in employment discipline in violation of Title VII must demonstrate more favorable treatment to other employees who engaged in "nearly identical" misconduct under "nearly identical" circumstances (as required by the Fifth, Sixth, and D.C. Circuits) or whether it is sufficient to show more favorable treatment of the employees who are "similarly situated" (as held by the Second, Third, Fourth, Eighth and Tenth Circuits)?

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OPINION BELOW

The opinion of the United State Court of Appeals for the Fifth Circuit is reported at *Perez v. Tex. Dept. Crim. Justice*, 395 F.3d 206 (5th Cir. 2004). (*See Appendix A.*) No opinion was issued by the United States District Court for the Western District of Texas.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fifth Circuit's opinion was rendered on December 21, 2004. Respondent's Motions for Rehearing and for Rehearing En Banc were denied on February 16, 2005. (*See Appendix B*).

STATUTORY PROVISION INVOLVED

Title VII 42 U.S.C. § 2000e:

(a) Employer practices:

It shall be an unlawful employment practice for an employer–

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

. . . . . .

STATEMENT OF THE CASE

This case involves the disparate discipline imposed on one Hispanic and three Anglo employees for off-duty misconduct. Petitioner Javier Perez brought this racial discrimination case under Title VII, 42 U.S.C. § 2000e. While employed by TDCJ as a corrections officer, Perez was arrested for assault. After being informed that the criminal charges would be dismissed, TDCJ instituted an Internal Affairs Division ("IAD") investigation. Following the investigation, Perez was fired for conduct unbecoming an officer. Although three other non-Hispanic officers were charged with similar off-duty criminal conduct, they were not subjected to an internal investigation and were not fired. *See Perez v. Tex. Dept. Criminal Justice*, 395 F.3d 206, 213-14 (5th Cir. 2004).

Two of the Anglo officers, Arlen and Gary Parma, were brothers. They were accused of becoming drunk while off-duty and going to the home of an elderly man and assaulting him. *Id.* After beating the man "senseless," they left him "lying on the ground" with punctured lungs and broken ribs. (4 R 150, 153) The Parma brothers nevertheless remained employed by Respondent, with one of the brothers actually *promoted* while their indictments were pending. Respondent did *not* initiate an IAD investigation of the Parmas' incident. The brothers eventually pled guilty to lesser offenses, and continued to work for Respondent as prison guards. *See Perez*, 395 F.3d at 213-14.

Another Anglo officer, Clover, was accused of felony intoxicated manslaughter for his drunk driving accident that resulted in a death. *Id.* Like the other two Anglo employees, Clover was *not* referred to the IAD, and was given years to

work out his criminal case without any internal discipline. Like Gary Parma, he was *promoted* while was under felony indictment.[1] (4 R 159-163) He served jail time on weekends while on leave from his job guarding criminals. Like the Parmas, he escaped an IAD investigation and was not fired. (4 R 162-65).

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1. Here is an excerpt from the warden's cross -examination at trial showing how well this Anglo employee was treated:

> Q. Okay. Now, let's talk a little bit about Shannon Clover. Are you acquainted with that gentleman?
>
> A. Yes, sir.
>
> Q. Now, did you also promote him while he was under a felony indictment?
>
> A. Yes, sir.
>
> Q. Manslaughter means where somebody dies, right?
>
> A. That's correct.
>
> Q. Okay. And knowing those two things, that he'd been drinking, got behind the wheel, got involved in an accident where somebody was killed, and charged with a felony, you promoted him anyway?
>
> A. Yes.
>
> Q. Okay. So, in the two years after this – after this lady died and after he was charged with a felony offense, he was given two years to let him work out his criminal problems, wasn't he, without an IAD investigation, right?
>
> A. Well, yes, sir. That's true.

Perez was arrested and charged with felony assault concerning the off-duty stabbing of a man at a bar. In contrast to the treatment of the Anglo employees, Respondent *did* initiate an IAD investigation, which investigation was ordered only *after Respondent* was notified that all charges against Perez would be dismissed. (5 R 162) The IAD investigation concluded that Perez had engaged in conduct unbecoming an officer, and he was fired. The criminal charges were then dropped. *See Perez*, 395 F.3d at 209.

The EEOC investigated Perez' complaint and found that Respondent TDCJ had discriminated against him because of his race and issued a Cause Determination. (4 R 188; *Appendix D*) The EEOC noted that all four prison guards were accused of criminal offenses and only the Hispanic was fired.[2]

At the charge conference, the district court instructed the jury as follows:

> To establish discrimination by using indirect evidence in this case, the plaintiff must prove by a preponderance of the evidence that one or more *similarly situated* non-Hispanic employees who engaged in criminal activity were treated more favorably. In comparing the nature of the offense at issue and the nature of the discipline imposed, the quantity and quality of the other employees'

2. The Fifth Circuit improperly ignores the EEOC's cause finding of race discrimination. "An EEOC determination prepared by professional investigators on behalf of an impartial agency, is highly probative." *Palasota v. Haggar Clothing Co.*, 342 F.3d 569, n.13 (5th Cir. 2003).

> misconduct must be of *comparable seriousness* to the misconduct of the plaintiff.

Perez, 395 F.3d at 211-12 (emphasis supplied by the Fifth Circuit.)

Based on this instruction and the evidence presented, the jury found that TDCJ did violate Title VII by discriminating against Perez based on his race.

The Fifth Circuit reversed, finding that the district court erred in instructing the jury as to the proper legal standard for determining whether the employees to whom Perez sought to compare himself were "similarly situated." The Court reasoned that the "comparably serious" standard set forth by this Court in *McDonald* and reaffirmed in *McDonnell* was not applicable because in this case, unlike in *McDonald* and *McDonnell*, the plaintiff was comparing his conduct to that of employees involved in separate, distinct incidents.

In such cases, the Fifth Circuit concluded, the employees' conduct as well as their circumstances must be "nearly identical" in order to establish a violation of Title VII. *See Perez*, 395 F.3d at 213-14. The Court concluded that the jury instruction could have affected the outcome of the case because the distinctions proferred by TDCJ [and rejected by the jury] "while seemingly not relevant under the rubric of comparable seriousness, could be relevant to the question of whether Perez, Parma and Clover's respective circumstances were nearly identical." *Id.*

REASONS FOR GRANTING THE PETITION

I. Review is Warranted to Resolve a Conflict Regarding the Proper Legal Standard to be Applied in Title VII Disparate Treatment Cases.

A. The Circuit Courts are Split Regarding the Proper Legal Standard to be Applied in Disparate Treatment Cases.

Two appellate Courts – the Sixth, and D.C. Circuits — have joined the Fifth Circuit in adopting the "nearly identical" test for disparate discipline cases, while five Courts – the Second, Third, Fourth, Eighth and Tenth – have rejected that standard.

The Sixth and D.C. Circuits embraced the "nearly identical" standard in the cases of *Jacklyn v. Schering-Plough*, 176 F.3d 921, 929 (6th Cir. 1999) and *Neuren v. Adduci, Mastiani, Meeks & Schill*, 43 F.3d 1507 (D.C. Cir. 1995.)

The other Circuit Courts reaching the issue have remained true to this Court's standard set forth in *McDonald McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). For instance, in *Lynn v. Deaconess Med. Center-West Campus*, 160 F.3d 484, 488 (8th Cir. 1998), the Eighth Circuit reversed a summary judgment where the district judge had constricted the term "similarly situated" to mean the exact same offense. There, the district court had found that the plaintiff nurse's evidence of comparable conduct was irrelevant because the other nurses were not found sleeping on the job as he was, but were guilty of other types of

misconduct, and further because the comparator nurses had different discipline records. In rejecting this standard, the Eighth Circuit observed:

> To require that employees always have to engage in the exact same offense would result in a scenario where evidence of favorable treatment of an employee who has committed a different but more serious, perhaps even criminal offense, could never be relevant to prove discrimination. Common sense as well as our case law dictate that we reject such an approach.

See id.

The Tenth Circuit has ruled similarly to the Eighth, as have the Fourth and Third Circuits, all rejecting a requirement that the employees' misconduct and circumstances be exactly the same, identical, or of precise equivalence. *See McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1261 (10th Cir. 1988) (holding that, while United presented evidence that other employees committed different rule violations and had mitigating circumstances, the fact that these other employees did not commit the exact same offense as the plaintiff does not prohibit consideration of their testimony [citing *McDonald*]); *Moore v. City of Charlotte*, 734 F.2d 1100, 1108 n.5 (4th Cir. 1985) (requiring comparable seriousness "less than precise equivalence"); *Filippo v. Bongiovanni*, 30 F.3d 424 (3d Cir. 1994) (requiring similarly situated that is not the same as "identically situated.") The Second Circuit has ruled similarly. *See Graham v. Long Island RR*, 230 F.3d 34, 40 (2d Cir. 2001) ("[W]here a plaintiff seeks to establish the minimal prima facie case by making reference to the disparate treatment of other employees, those employees must have a

situation sufficiently similar to plaintiffs to support at least a minimal inference that the difference of treatment may be attributable to discrimination.)[3]

This split in the Circuit Courts warrants a review of this case by this Court, which has set the proper legal standard for disparate treatment cases. Review is necessary to resolve this untenable split of authority among the courts of appeals to ensure uniform enforcement of Title VII throughout the nation. "Similarly situated" is a standard that is understandable to judges and juries and true to Title VII and the opinions of this Court.

The difference in legal standards among the circuits is not a simple matter of different ways to articulate the same basic legal test. The difference has dramatic real-world consequences, as seen by the result in cases where the comparator engages in more egregious conduct than the plaintiff, as discussed by the Eighth Circuit, and where the plaintiff is employed in a unique position. Such a test would render Title VII meaningless to those who have unique jobs; i.e. jobs without any "nearly identical" comparators. Forcing a plaintiff to show more than 'similarly situated' would lead to the paradoxical situation where a plaintiff whose job responsibilities are unique to his or her position will *never* successfully establish a prima facie case (absent direct evidence of discrimination). This is because some jobs have no "nearly identical" comparators. Under such construct, an

3. Like the Fifth Circuit, the Eleventh Circuit has both embraced and rejected the "nearly identical" test. *See Silvera v. Orange Co. Sch. Bd.*, 244 F.3d 1253,1259 (11th Cir. 2001) (embracing); *Anderson v. WBMG-42*, 253 F.3d 561, 565 (11th Cir. 2001) (rejecting); *see also Maynard v. Board of Regents*, 342 F.3d 1281, 1290 (11th Cir. 2003) (acknowledging internal split.)

employer would be free to discriminate against those employees occupying "unique" positions.

In either case, finding suitable comparators under the "nearly identical" test is extremely difficult, undermining the purpose of Title VII. Ironically, the Fifth Circuit effectively concedes the significance of this difference in its opinion by stating that TDCJ's proffered justifications for its disparate treatment "while seemingly not relevant under the rubric of comparable seriousness, could be relevant to the question of whether Perez, Parma and Clover's respective circumstances were nearly identical." *See Perez*, 395 F.3d at 214.

B. The Fifth Circuit's Legal Standard Conflicts with Decisions of this Court and the Purposes of Title VII.

The Fifth Circuit's constructive legislation of a new legal standard ignores thirty years of precedent in this Court and undermines the meaning and purpose of the Title VII legislation. This Court has twice considered what must be proven in a case of disparate discipline under Title VII, and has twice held that a plaintiff need only prove "comparable seriousness" *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973). "Precise equivalence" is not required. *See McDonald*, 427 U.S. 283 n.11.

In *McDonnell Douglas*, this Court was faced with a plaintiff who was refused rehire because he illegally took the law into his own hands, disrupted traffic, and caused a work stoppage. Rather than require the Plaintiff to show the

misconduct was "nearly identical," this Court held that the misconduct must be of "comparable seriousness."

> [An employer] may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.

Id. at 804.

Although it may be facially appealing to feel that since Perez engaged in bad acts, he is not worthy of relief, in both *McDonald* and *McDonnell*, this Court held that racially motivated discipline contravenes Title VII despite the plaintiff having engaged in bad acts. In *McDonald*, for instance, the plaintiffs were thieves. Painting the plaintiff as a "bad' person, then, is simply no defense to racial discrimination.

The Fifth Circuit's opinion diverts from the holdings in *McDonald* and *McDonnell* by applying an overly restrictive legal standard of "nearly identical" conduct and circumstances; one that makes it virtually impossible to find appropriate comparators and thus undermines enforcement of Title VII.

The Court's attempt to distinguish *McDonald* and *McDonnell* based on whether the employees are involved in the "same" incident or separate, unrelated incidents, makes no sense. Individuals can participate in even the same act of misconduct in many different ways, each with a varying degree of culpability (for instance, the robber as opposed to his "look out," both charged and convicted of the same crime). In this case, all parties agreed the Anglo employees' misconduct were comparably serious, and the Fifth Circuit's opinion appears to concede this as well. *See Perez*, 395 F.3d at 214-215.

The comparator's crimes were arguably even more serious than was Perez's, yet this cannot be considered under the Fifth Circuit's "nearly identical" test.

The crux of this case was the Warden's attempt to explain the special treatment given to the Anglo employees. It was for the jury as the fact finder to determine whether the plaintiff and the comparators were "similarly situated" or not. The Fifth Circuit notes the Warden's difficulties in explaining his reasoning for the disparate treatment in its rejection of Perez's Rule 50 issue. Yet the jury's rejection of his explanation *alone* is sufficient for the jury to find race discrimination, regardless of whether the circumstances of the four men were "nearly identical" or not. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135, 120 S. Ct. 2097, 2102, 147 L. Ed. 2d 105 (2000); *Desert Palace, Inc. v. Acosta*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003).

The Fifth Circuit's's superimposing a "nearly identical" test in the jury charge is not only in conflict with this Court's opinions, it is in conflict with Title VII. This construct would undermine the remedial purpose of the anti-discrimination statutes. Title VII will be relegated to irrelevance if a plaintiff must prove that his misconduct was "nearly identical" to individuals of another race who suffered no discipline, and that the circumstances surrounding the firing were also "nearly identical." There are probably very few, if any, situations where both the misconduct and the employee's situation would be "nearly identical," thus demonstrating the almost impossible burden plaintiffs would be required to overcome under this test. This clearly was not the purpose of Title VII.

This Court has always affirmed Title VII's meaning under the law, and has never superimposed the "nearly identical" standard. On the contrary, this Court has held, plainly, that the matters be of "comparable seriousness," not "precisely equivalent." The Circuit Courts are in disarray on this question such that Title VII is not being uniformly enforced. This case should be reviewed by this Court and upon consideration, the split of authority resolved, and the Fifth Circuit's opinion reversed.

CONCLUSION

Because of the important circuit split and the varying standards of proof under Title VII, Petitioner respectfully requests that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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